U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 June 2003

CASE NO.: 2002-LHC-2054

OWCP NO.: 07-156806

IN THE MATTER OF:

WILLIAM G. BEYERS

Claimant

v.

HALTER MARINE

Employer

RELIANCE NATIONAL INDEMNITY COMPANY AND MISSISSIPPI INSURANCE GUARANTY ASSOCIATION[1]

Carriers

APPEARANCES:

TOMMY DULIN, ESQ.

For The Claimant

MICHAEL J. MCELHANEY, ESQ.

For The Employer/Carrier

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq.,

[1] The caption appears as amended at the formal hearing.

(herein the Act), brought by William G. Beyers (Claimant) against Halter Marine (Employer) and Reliance National Indemnity Company and Mississippi Insurance Guaranty Association (Carriers).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on December 13, 2002, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant submitted 18 exhibits, Employer/Carrier proffered 35 exhibits which were admitted into evidence along with one Joint Exhibit.[1] This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from Claimant and Employer/Carrier on March 17, 2003 and March 19, 2003, respectively. Based upon the stipulations of Counsel, the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

Claimant and Employer/Carrier stipulated (JX-1), and I find:

1. Jurisdiction is not a contested issue.

2. That Claimant was injured on September 1, 1999.

3. That Claimant's injury occurred during the course and scope of his employment with Employer.

4. That there existed an employee-employer relationship at the time of the accident/injury.

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[1] Subsequent to the formal hearing, Employer/Carrier submitted a letter dated March 13, 2003, addressed to Dr. Charles J. Winters, which has been marked for identification as EX-35. No objections having been received from the opposing parties, EX-35 is hereby received into evidence.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.__; Claimant's Exhibits: CX-__; Employer/Carrier's Exhibits: EX-__; and Joint Exhibit: JX-___.

5. That the Employer was notified of the accident/injury on September 1, 1999.

6. That Employer/Carrier filed a Notice of Controversion on June 15, 2000.

7. That informal conferences before the District Director were held on January 31, 2001 and March 1, 2002.

8. That Claimant received disability benefits from September 22, 1999 through April 6, 2001 or 80 2/7 weeks at varied compensation rates for a total of $40,641.72 and from November 21, 2001, to present for a total of $22,993.23.

9. That Claimant's average weekly wage was $868.94 at the time of his work injury.

10. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

11. That Claimant reached maximum medical improvement on March 27, 2001.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Authorization for treatment with Dr. Wyatt.

3. Employer/Carrier's entitlement to Section 8(f) relief.

4. Attorney's fees, penalties and interest.

III. SUMMARY OF THE EVIDENCE

The Testimonial Evidence

Claimant

Claimant testified at the hearing and was deposed by the parties on November 27, 2002. (EX-11). Claimant is a high school graduate who completed welding school at Gulf Coast Junior College and received a welding certificate. (Tr. 20; EX-11, p. 7). He was hired by Employer on July 17, 1985, as a full-time

tacker/helper, and thereafter progressed to positions as a shipfitter, quality control inspector and production coordinator. (Tr. 22-23).

Claimant suffered two prior back injuries while working for Employer. In 1994, he underwent back surgery and lost work time for which he received workers' compensation. He also lost work time in 1997 as a result of a second back injury and surgery for which compensation and medical expenses were paid. After each surgery, Claimant was assigned work restrictions. (Tr. 23-24).

On September 1, 1999, Claimant suffered a third back injury when he rolled a chain tugger and hurt his back and "felt some pain go down to my right leg and over part of my back." (Tr. 24; EX-11, p. 8). He initially treated with Dr. Ennis who diagnosed a "pulled muscle," prescribed pain and muscle relaxant medications and told him to go back to work. Claimant returned to work for about one week and did not get any better. He asked to treat with Dr. Winters who had performed his two previous surgeries. Dr. Winters took him off all work and performed x-rays, and scheduled an MRI. (Tr. 25-26). Dr. Winters informed Claimant he had a ruptured disc and performed a third surgery with "two steel rods down each side of my spine and screws and done a fusion on my back" in March 2000. (Tr. 26).

Claimant was prescribed physical therapy which did not help and was referred to Dr. Joe Chen, a pain management physician. (Tr. 26). Dr. Chen prescribed OxyContin for pain and Zanaflex, a muscle relaxant, performed nerve blocks that lasted only about one month and referred him to Dr. Wyatt. (Tr. 27).

Dr. Wyatt took Claimant off OxyContin and prescribed Duragestic patches and Lortabs. He performed a radiofrequency procedure on Claimant's left side which provided some relief even though he still had some pain. He recommended a radiofrequency procedure on the right side, but Employer/Carrier did not authorize the procedure. Claimant testified that he wants to undergo the procedure if approved. (Tr. 27).

Claimant has treated with Dr. Cole, a psychologist, for pain and depression. He was placed on Prozac for a while and given exercises for his pain. (Tr. 27-28).

On or about August 7, 2000, Dr. Winters released Claimant for modified work for four hours per day. Claimant reported to Employer, but was told no light work was available at that time.

Claimant was called into work light duty "a month and a half" later. (Tr. 28). He worked four hours per day, four days a week, sitting in the tool room handing out welding rods and electrical tape. He had no problems performing the modified work and was paid compensation benefits. (Tr. 29). He was not permitted to work overtime while on modified duties. (Tr. 31).

On or about March 12, 2001, Claimant underwent a functional capacity evaluation requested by Dr. Winters who subsequently assigned a 20 percent impairment rating and maximum medical improvement. (Tr. 30). Claimant testified that he was restricted to limited crawling, climbing, standing and no lifting over 20 pounds. After reaching maximum medical improvement, he began working light duty 10-hour days, four days per week in the tool room. (Tr. 31).

On November 15, 2001, Claimant was laid off by Employer. He stated Employer noted on his layoff slip that he was unable to do the essential job of a shipyard worker. (EX-11, p. 11). He sought employment at F & M Paint, Vice Construction, Crews Electric, Floore Construction and Lowe's Building Materials, but without success. He has not worked since his lay off from Employer. He testified he did not feel he could work anywhere because "I'm not able to do--get up and move around. I stay in pain most of the time." (Tr. 32). He presently receives workers' compensation benefits every 14 days in the amount of $806.00. (Tr. 33).

Claimant's daily activities involve coaching his son in little league baseball. (Tr. 34). He can rake a little of the yard but his kids do most of the housework while his wife works. (Tr. 38).

Claimant testified Drs. Winters and Wyatt told him he was totally disabled. He continues to hurt in the lower part of his back and down his right leg. He described the pain as "sharp intense . . . like a knife twisting in your nerves."
He stated he has problems sitting for "a long time" then begins to hurt and if he stands "for a while, I do the same thing." He has to adjust his positions all the time. (Tr. 35). He sleeps only three or four hours per night. He has to sit down if he walks "for a while" and has problems lifting more than 15 to 20 pounds. He rests during the day, particularly if he knows he is later going somewhere with his family. (Tr. 36).
Claimant testified he has side effects from his medication which make him "real drowsy and sleepy." (Tr. 37).

Claimant did not meet, nor was he contacted by or requested to meet, with vocational expert Pennington. (Tr. 39).

On cross-examination, Claimant testified that after his first two surgeries he had continuing problems with his back which caused him to lose work time and wages. (Tr. 41). He believed a radiofrequency procedure on his right side would help his ability to perform sedentary work. He affirmed the assigned 20 percent impairment rating comprised a seven percent impairment as a result of his first surgery, an additional seven percent assigned after his second surgery and six percent assigned after his third surgery for a total of 20 percent impairment. (Tr. 42).

Christopher Ty Pennington

Mr. Pennington, a certified rehabilitation counselor with Rehabilitation, Incorporated, performed a hypothetical labor market survey for Claimant at the behest of Employer/Carrier. In preparation, he reviewed various medical records and reports listed in his survey which was completed on December 10, 2002. (Tr. 44; EX-32). He began with the premise that Claimant could do some type of work according to Drs. Winters and Wyatt and the results of the functional capacity evaluation. (Tr. 64). The parties stipulated to his status as an expert in vocational rehabilitation counseling. (Tr. 49; EX-8).

Mr. Pennington acknowledged that he did not meet with Claimant before conducting his survey and admitted it would have been beneficial to do so. (Tr. 44-45). He performed no testing of Claimant. (Tr. 63). He acknowledged Dr. Winters opined Claimant could work sedentary clerical-type jobs with training. (Tr. 46-47). He clarified that the restrictions assigned by Dr. Winters, i.e., no lifting greater than 20 pounds and no lifting on a frequent basis greater than 10 pounds by definition was light level work according to the Dictionary of Occupational Titles. (Tr. 47).

Mr. Pennington opined that Claimant's former job as a production coordinator was medium to heavy in exertional demands and he could not return to his former job duties. (EX-32, pp. 3-4). He identified the following jobs, which he testified were also available when Claimant reached maximum medical improvement on March 27, 2001 (Tr. 48):

> (1) security guard positions at Boomtown Casino in Biloxi, Mississippi paying $7.50 per hour which are considered light work

involving occasional bending and stooping and frequent reaching and handling;

(2) a sedentary dispatcher position with the City of Biloxi, Mississippi which required "minimum typing and number test," paid a starting hourly wage of $10.79 and was responsible for processing incoming calls and directing them to the appropriate police department or fire unit;

(3) a Communications Call Taker position with the City of Biloxi which handled "the first line of calls and will not be responsible for emergency situations" and paying $9.31 an hour;

(4) light delivery driver positions at Papa John's Pizza in Pascagoula, Mississippi which required a good working knowledge of the area and good customer service skills. An estimated income of $300.00 per week could be expected, but no hourly rate was stated;

(5) a recreation aide at Keesler Air Force Base in Biloxi, Mississippi responsible for outdoor recreation for military base activities, light in nature with a starting wage "of up to $9.60 an hour";

(6) sweeper driver positions with Van Elmore Services in Mobile, Alabama which are light in nature requiring the applicant to operate a sweeper machine to clean parking lots, frequent reaching and handling were required, with a starting wage of $6.50 an hour;

(7) Order clerks with Sears Telecenter in Mobile, Alabama paying $7.89 an hour and are sedentary in nature, involving frequent reaching and handling, required applicant to answer telephones assisting customers with replacement parts and taking orders for parts and services, some typing skills with "excellent customer skills and some mechanical knowledge in order to process customer request" were required;

> (8) a light level inside sales position with Stuart C. Irby, an electrical supply company, which required a "strong electrical background along with customer service skills," applicant must possess some computer skills along with oral and written skills starting at $25,000.00 per year;
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> (9) a sedentary position as Public Safety Dispatcher with Mobile County Personnel in Mobile, Alabama, responsible for operating a radio to communicate with police and fire departments, which required the passage of a two-part examination including an ability to type 30 words a minute and a course in word processing with a starting salary from $1,615.00 and $2,506.00 a month; and
>
> (10) a light level counter rental manager for an equipment rental company with good customer service skills and a knowledge of equipment beginning at $20,000.00 a year.

Mr. Pennington also listed three positions advertised by the Mississippi Employment Security Commission as security guard paying $7.00 an hour, bus driver paying $6.63 an hour and locksmith apprentice paying $8.00 an hour. No further details were provided regarding the nature or terms of the jobs to include the physical demands or requirements of each. (EX-32, pp. 4-5).

Mr. Pennington was not aware of Claimant's medications or their affects upon his ability to perform any type of employment. (Tr. 49). Although he contacted each employer listed in his survey, he did not inquire about their specific policy on taking medications on the job. (Tr. 55). He stated the functional capacity evaluation conducted on Claimant revealed he could perform work in the light category. (Tr. 54).

On further examination by the undersigned, Mr. Pennington clarified that the security guard position at Boomtown Casino required walking three to four hours of an eight hour shift and, since it is categorized as a light job, lifting up to 20 pounds was required. (Tr. 57). The security guard would be required to apprehend persons if the circumstances presented itself. (Tr. 58). No further details of the job description for the positions with the City of Mobile were known. Id.

The Medical Evidence

Dr. John Wyatt

Dr. Wyatt, a board-certified physical medicine and rehabilitation physician, was deposed by the parties on November 18, 2002. (CX-13; CX-18). He has treated Claimant since November 30, 2001. Claimant's symptoms have been characterized by restriction in range of motion and flexion of lateral bending and rotation, diminished reflexes or sluggish reflexes, pain on arising from a seated position and pain in mobility. (CX-13, p. 8; CX-18, pp. 6-8). Claimant's pain has been gauged as an 8-9 on a 10 point scale. (CX-18, p. 8).

On June 7, 2002, Dr. Wyatt performed a lumbar medial branch block or radiofrequency on the left which provided significant improvement in Claimant's pain. (CX-13, pp. 3-4). Thereafter, on August 1, 2002, Dr. Wyatt requested authorization to perform a radiofrequency or right medial branch block which was denied by Carrier. (CX-13, pp. 1-2; CX-18, pp. 9-10, 17-18, 59). A successful block can last for six to nine months. (CX-18, p. 11).

Dr. Wyatt opined that Claimant could not return to his former job which was unrealistic for Claimant. (CX-18, p. 27). He last examined Claimant on October 24, 2002, but sees him every 30 days because he is on Class II opiates in the form of a Duragesic patch and Lortab. (CX-18, p. 28). He testified when Claimant was referred from Dr. Chen in November 2001 he was on OxyContin, which Dr. Wyatt replaced with Claimant's present medications. (CX-13, p. 6; CX-18, pp. 31-33).

Dr. Wyatt's initial impression of Claimant in November 2001 was that he had a failed back syndrome, lumbar disc disease, lumbar radiculopathy, spondylosis and depression. Dr. Wyatt opined that the medical information in his records "gives substance to the idea that they {the above conditions] are causally related to Claimant's accident with Employer on September 1, 1999. He further opined that Claimant continues to have difficulties related to his accident/injury and subsequent surgeries. (CX-18, p. 35).

Dr. Wyatt testified the radiofrequency ablation procedure on the right is a reasonable and necessary medical procedure and would be beneficial to Claimant. (CX-18, pp. 36-37).
It is "perfectly reasonable" to perform in view of the success from the left-sided radiofrequency. (CX-18, p. 37). He referred

Claimant to Dr. Cole, a psychologist, for evaluation of his depression. Id.

Dr. Wyatt testified there is no causal relationship between Claimant's diabetes and hypertension and his injury, however, each condition can be made worse by ongoing pain. (CX-18, p. 38).

Dr. Charles Winters

Dr. Winters is board-certified in Orthopedic surgery. The parties deposed Dr. Winters on April 16, 2002. (CX-16).

Dr. Winters first treated Claimant for his back in 1994 when he reported a six to eight month history of pain without any definite history of injury. A L5-S1 laminotomy and discectomy on the right was performed on June 16, 1995. (CX-16, p. 50). Claimant reached maximum medical improvement from the surgery on September 13, 1995 and was assigned a seven percent permanent partial impairment. (CX-16, p. 5).

Dr. Winters performed a second back surgery on September 25, 1997, similar to the first surgery but on the opposite side at the same level. (CX-16, pp. 5-6, 64). Claimant reached maximum medical improvement from the second surgery on December 30, 1997, with an additional seven percent permanent partial impairment. (CX-16, p. 6). Dr. Winters opined that Claimant could return to his normal duties without restrictions on December 30, 1997. (CX-16, p. 7).

On September 7, 1999, Claimant returned to Dr. Winters with an injury from lifting at work complaining of back pain radiating down his right leg for a period of one week. His physical examination did not reveal any significant abnormalities. His x-rays showed only post-operative changes and no evidence of any new injury. Dr. Winters believed Claimant should be treated conservatively. (CX-16, pp. 8-9). On September 21, 1999, Claimant was taken off work and Dr. Winters ordered a MRI scan which revealed a disc herniation at the disc above his previous surgery at L4-5. (CX-16, pp. 9, 71, 73).

On December 1, 1999, Dr. Winters opined that a laminectomy and fusion surgery was necessary because of the development of spinal stenosis and recurrent disc herniation. (CX-16, pp. 10-12). On March 2, 2000, Dr. Winters performed a laminectomy at L4-5 and L5-S1 with bilateral lumbar fusions and pedicle screw fixation from L4 to the sacrum. (CX-16, pp. 87-88). Claimant followed-up with Dr. Winters post-surgery. On May 26, 2000,

Claimant reported his leg gave out and he slipped and fell resulting in complaints of knee, leg and lower back pain. (CX-16, p. 97). In August 2000, Dr. Winters increased Claimant's exercise activity and allowed him to return to light duty for four hours per day doing clerical-type work. (CX-16, pp. 14, 104, 112).

Claimant returned for follow-up in September and November 2000, however Dr. Winters concluded there was not anything from a physiological standpoint to explain his pain. (CX-16, p. 15). The nerve compression had been relieved and there was not much else to do from a surgical standpoint. Claimant was offered epidural steroid treatments and allowed to continue working four hours per day. On March 6, 2001, Dr. Winters noted Claimant was seeing Dr. Chen for pain management and despite persistent pain he did not think there was anything further to be done for Claimant. Claimant was in physical therapy as directed by Dr. Winters who recommended a functional capacity evaluation be done. (CX-16, pp. 16, 135).

Dr. Winters last saw Claimant on March 27, 2001, when he reviewed this history and symptoms. On physical examination, Claimant had significant restricted lumbar range of motion, his reflexes were normal and he had no motor deficits. His CT myelogram since surgery was normal, a repeat MRI showed no evidence of recurrent disc herniation and his fusion looked solid. In Dr. Winter's opinion "there was nothing further to do." (CX-16, p. 17). He opined Claimant had reached maximum medical improvement and assigned a 20 percent impairment to the whole person. Dr. Winters assigned permanent restrictions of no lifting greater than 20 pounds, no lifting on a frequent basis of greater than 10 pounds, limited bending and stooping, limited crawling, squatting and kneeling and limited ladder climbing. (CX-16, pp. 18, 140, 149).

On February 19, 2002, Dr. Winters authored a letter addressed "To Whom It May Concern," in which he opined that Claimant is:

> "significantly disabled and unable to do any type of physical activity and is limited to very light activities. I don't think he is a good candidate for returning to work at his previous occupation which was that of laborer. I think that he is permanently disabled from his back condition and should be a good candidate for social security disability."

(CX-16, p. 158).

In deposition, when asked if he thought Claimant was permanently and totally disabled, Dr. Winters stated there was "some type of work that almost anybody can do if they can be trained to do it." With regard to Claimant, Dr. Winters testified "he can sit and answer a telephone and he can do some light, sedentary, clerical-type work." (CX-16, p. 19). Claimant would have to have intermittent breaks to change his position as he needs to for pain. (CX-16, p. 20).

Dr. Winters confirmed that Claimant had two prior back surgeries in 1995 and 1997 and had a pre-existing permanent partial disability to his back before his most recent job-related back injury. (CX-16, p. 21). Dr. Winters testified that Claimant's current disability is not due solely to his 1999 injury, but is a combination of three injuries in 1995, 1997 and 1999 which have made Claimant's disability worse than it would have been from the 1999 injury alone. He opined that the pre-existing back conditions contributed to his current disability. (CX-16, p. 22).

On cross-examination, Dr. Winters confirmed that Claimant's September 1, 1999 job accident caused a new and different cervical/lumbar disc problem than he had from the accidents in 1995 and 1997. (CX-16, p. 24).

On March 13, 2003, Dr. Winters executed a letter prepared by Counsel for Employer/Carrier relating to the Section 8(f) issue. Supplementing his responses to questions propounded at pages 21 and 22 of his deposition, Dr. Winters was asked "Is the Claimant's cumulative disability materially and substantially greater due to Claimant's pre-existing disability that is the 1995 and 1997 injuries and back surgeries?" Dr. Winters checked the answer "Yes." (EX-35, p. 2)

Dr. Y. C. Joe Chen

Dr. Chen is a Diplomat of the American Board of Anesthesiology and Subspecialty Certification in Pain Management. (CX-15). He first examined Claimant at the Sun Coast Pain Management Center on January 17, 2000, with a chief complaint of low back pain going down the right leg. A physical examination was conducted and a plan devised to wean Claimant off his medications and develop behavioral medicine techniques. (CX-15, pp. 29-31). On February 29, 2000, Dr. Chen's assessment was

failed back syndrome, lumbar disc disease and lumbar radiculopathy. (CX-15, p. 27).

Dr. Chen continued to evaluate Claimant monthly through June 1, 2000, for his pain complaints. At this visit, Dr. Chen assessed depression secondary to chronic pain. (CX-15, pp. 24-26). Dr. Chen referred Claimant to Dr. Jonathon Cole, a behavioral medicine specialist, who opined that Claimant met the criteria for adjustment disorder with depressed mood and pain disorder associated with both psychological factors and a general medical condition. (CX-15, p. 23). In August and September 2000, Dr. Chen discussed treatment options with Claimant including the use of a spinal cord stimulator. (CX-15, pp. 20-22).

On January 8, 2001, Dr. Chen discussed with Claimant the possibility of performing a block at the L4-5, L5-S1 facet joints on the right with possible radiofrequency procedure follow-up if the block is not long lasting. (CX-15, p. 17). On March 15, 2001, Dr. Chen performed the medial branch blocks to the lumbar facets. (CX-15, pp. 13-14). On April 3, 2001, Claimant returned for a repeat of the lumbar medial branch blocks reporting greater than 70% pain relief from the March injection for only a short period of time. (CX-15, pp. 11-12). On April 26, 2001, after achieving 60-70% pain decrease from the branch blocks, Dr. Chen performed a radiofrequency lesioning to the L3-4, L4-5, L5-S1 facet joints on the "right side." (CX-15, pp. 9-10).

On May 11, 2001, Claimant reported that the radiofrequency lesioning "helped his pain tremendously" and his current pain level was down to a 4 of 10 from a 9 of 10 when Dr. Chen began treatment. (CX-15, p. 8). On June 20, 2001, Claimant reported that when he stands for a long time he feels shooting pain and feels a numbness on the outside of his right leg. Pain medications were lasting only four to five hours and he was continuing to work, but it was becoming "harder and harder for him to work." Dr. Chen discussed the possible use of a spinal cord stimulator. (CX-15, p. 7).

Dr. Chen continued to evaluate Claimant through November 14, 2001 when he asked Dr. John Wyatt to consult with Claimant. (CX-15, pp. 2-6). On June 12, 2002, Dr. Chen authored a memorandum addressed "To Whom It May Concern" opining that the spinal cord stimulator would be appropriate for Claimant and was medically necessary for his pain and its radicular component. (CX-15, p. 1).

Dr. William A. Crotwell

Dr. Crotwell performed a second opinion evaluation of Claimant on January 28, 2000. He concluded that Claimant had subjective complaints and objective findings to support a L4-5 disc to the right. He opined that Claimant had a new herniation which could have and was consistent with the description of his job accident in September 1999. Claimant was not able to return to work and Dr. Crotwell could not give any restrictions or any disability rating or MMI assessment. He opined that Claimant needed surgical treatment. (EX 29, pp. 1-2).

Jonathan D. Cole, Ph.D.

Dr. Cole is a Clinical Psychologist and Behavioral Medicine Specialist associated with the Sun Coast Pain Management Center. On May 12, 2000, Dr. Cole administered testing of Claimant. He concluded Claimant's testing was valid. Claimant was determined to be over-focused on his physical symptoms with "quite a bit of anger" and a significant amount of depression. His Pain Disability Index ranged from moderate to severe which suggested Claimant perceived himself as significantly disabled due to his pain. He also perceived himself as totally disabled vocationally. (CX-14, p. 15).

Dr. Cole's diagnostic impressions were Adjustment Disorder with depressed mood, pain disorder associated with both psychological factors and a general medical condition. Id. Claimant did not present with symptoms compatible with a narcotics addiction problem. Dr. Cole recommended that Claimant receive medical treatment for depression and psychological treatment involving cognitive therapy, pain management, relaxation training and if needed biofeedback. He also recommended five individual therapy sessions to assess his progress. (CX-14, p. 16).

Claimant began individual sessions on May 19, 2000 and completed the five recommended sessions on August 21, 2000, at which time his psychological problems were considered to be in remission. Claimant was discharged from Dr. Cole's clinic. (CX-14, pp. 7-13). On January 21, 2002, Claimant returned to Dr. Cole with a significantly depressed mood, having difficulty coping with his pain. (CX-14, p. 4). Claimant followed-up with three additional individual sessions through April 1, 2002. (CX-14, pp. 3-5). An undated Discharge Report by Dr. Cole reveals Claimant used the skills taught him in treatment to maximize gains made in treatment and appeared not to have any depression and is coping

with his pain in an adaptive manner. Claimant was again discharged from the clinic. (CX-14, p. 1).

Dr. Howard G. Westbrook

Dr. Westbrook is a family physician. He has treated Claimant for non-insulin dependent diabetes and hypertension since November 3, 1999. (CX-13, pp. 1-13).

The Functional Capacity Evaluation (FCE)

On March 12, 2001, a FCE was performed at Singing River Hospital by Robin Walley, P. T., Certified Ergonomic Evaluation Specialist. (EX-26). It was concluded that Claimant was able to work at the medium physical demand classification. It was determined that Claimant provided good effort during the testing. No symptom exaggeration was evident. His pain profile was high (8/10) and he did not have positive findings for the Waddell or Korbon non-organic signs. It was recommended that Claimant's restrictions include alternate body positions frequently and limited lifting occasionally to 25 pounds. (EX-26, pp. 66-68).

The Contentions of the Parties

Claimant contends he is permanently and totally disabled from his September 1, 1999 work injury. He asserts that he has been paid compensation benefits based upon an incorrect average weekly wage of $844.78, whereas the parties stipulated that his proper average weekly wage was $868.94. He further claims that he is entitled to Section 7 medical services recommended by Dr. Wyatt, to include the radiofrequency procedure. Alternatively, Claimant contends he is permanently partially disabled with a loss of wage earning capacity greater than the amount computed and paid by Employer/Carrier.

Employer/Carrier contend that Claimant is permanently and totally disabled based on the opinions of Drs. Winters and Wyatt. They argue that Claimant's testimony that he is in pain and unable to work is corroborated by the opinion of Dr. Wyatt. Although Claimant performed a job search, it was unsuccessful and Employer/Carrier submit they have found only one job that Claimant could possibly perform at Papa John's Pizza. It is also argued that it is unknown whether any prospective employers would permit Claimant to work while taking medications which produce side-effects of drowsiness.

Employer/Carrier further contend they have established the pre-requisites for entitlement to Section 8(f) relief. They argue that Claimant suffered back injuries in 1995 and 1997 that materially and substantially affected Claimant's disability.

The District Director argues that the opinions of Dr. Winters establishes the combination and manifest requirements for entitlement to Section 8(f) relief. The District Director asserts that should the undersigned conclude Claimant is permanently and totally disabled "to a percentage consistent with Claimant's injuries," the District Director would support the Amended Petition for Section 8(f) relief as presented. However, should the undersigned find Claimant is permanently and partially disabled, the District Director submits there is no evidence to support entitlement to Section 8(f) relief inasmuch as there is no evidence to show Claimant's disability is materially and substantially greater than the second injury alone. The District Director relies upon "no labor market surveys or other evidence in Claimant's file to support a finding which could entitle the Employer/Carrier to Section 8(f) relief if Claimant is found permanently and partially disabled" citing Louis Dreyfus Corporation v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

On February 3, 2003, the District Director responded to Employer/Carrier's post-hearing labor market survey which it is contended "does not establish the extent of disability of the Claimant from the first to the second injury and therefore does not change the District Director's position."

Lastly, on February 7, 2003, the District Director, in response to Employer/Carrier's agreement with Claimant that he was permanently and totally disabled, noted that the parties cannot bind the Special Fund without evidentiary support.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512

U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Disability

The parties stipulated, the record establishes and I find that Claimant suffered an injury on September 1, 1999, within the course and scope of his employment with Employer. Therefore, I find and conclude that Claimant has sustained a disabling and compensable injury under the Act. However, the burden of proving the nature and extent of his disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability

suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether Claimant is totally disabled. Curit v. Bath Iron Works Corp., 22 BRBS 100, 103 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

In the present matter, the parties stipulated, the record supports and I find that Claimant reached maximum medical improvement on March 27, 2001, pursuant to the medical opinion of Dr. Winters.

Drs. Winters, Wyatt and Crotwell opined that Claimant cannot return to his former job as a production coordinator with Employer. Dr. Winters assigned permanent restrictions to Claimant on March 27, 2001, of no lifting greater than 20 pounds, no frequent lifting greater than 10 pounds, limited bending and stooping, limited crawling, squatting and kneeling and limited ladder climbing. Dr. Wyatt did not assign any restrictions to Claimant, but noted Claimant suffers from restricted range of motion, diminished reflexes and pain with mobility which requires the use of Class II opiates. Although the FCE resulted in a determination that Claimant was able to work at the medium level of physical demand, it was recommended that Claimant should frequently alternate body positions and limit lifting to 25 pounds occasionally.

Based on the foregoing, I find and conclude that Claimant has established a **prima facie** case of total disability in that he is

unable to return to his former or regular work as a production coordinator for Employer. Therefore, Claimant is determined to be temporarily totally disabled from September 1, 1999 to March 27, 2001, at which time he reached maximum medical improvement. Accordingly, Claimant is entitled to temporary total disability compensation from September 1, 1999, excluding periods of modified employment, to March 27, 2001, based upon his average weekly wage of $868.94.

B. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert

with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997).

Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Utilizing the permanent restrictions assigned to Claimant by Dr. Winters, Mr. Pennington identified position openings at ten prospective employers in the Gulf Coast area. However, the precise nature and terms of the job opportunities were not clearly established. Furthermore, Mr. Pennington did not inquire about any of the employer's policies regarding the use of medications on the job.

Thus, the communications call taker, Keesler Air Force base recreation aide, sweeper driver and counter rental manager positions were identified only as "light in nature" or "light

level." No specific job description from each employer was obtained to compare the job demands of these four positions with Claimant's assigned limitations in lifting, bending, stooping, crawling, squatting, kneeling, ladder climbing or frequency of alternation of body positions. In the absence of such specificity, it cannot be determined whether Claimant can physically perform such work and, thus, whether such work is suitable for Claimant. Accordingly, I find these four positions do not constitute suitable alternative employment.

The identified jobs of dispatcher with the City of Biloxi and Mobile County Personnel required the passage of typing and/or word processing tests. However, in the absence of testing by Mr. Pennington, the record is devoid of any evidence that Claimant has the aptitude to compete for these positions which require skills of a clerical nature. Moreover, the jobs as identified provide no description of the physical job requirements of each employer beyond "sedentary." No comparison of the job demands can be made with Claimant's physical limitations. For these reasons, I find the dispatcher positions are not suitable alternative employment.

The jobs of light delivery driver with Papa John's Pizza, order clerks with Sears Telecenter and the sales position with Stuart C. Irby require typing and/or computer skills and good customer service skills, none of which is established as attributes of Claimant on the instant record. Since Mr. Pennington did not interview Claimant, no rational opinion regarding Claimant's vocational abilities could be offered. Therefore, I find these jobs are not suitable for Claimant and exceed his vocational capabilities as established in the record.

Lastly, the three generic jobs advertized by the Mississippi Employment Security Commission of security guard, bus driver and locksmith apprentice provide no details of the precise nature and terms of the job requirements and, thus, cannot be compared to Claimant's limitations. These generic jobs cannot be considered suitable alternative employment and I so find.

In conclusion, based on the foregoing, I find and conclude Employer/Carrier failed to establish suitable alternative employment that Claimant is capable of performing or for which he could compete and reasonably and likely secure. Since Employer/Carrier failed in its burden, Claimant remained totally disabled after reaching maximum medical improvement. Since he has residual disability and vocational restrictions, his total disability became permanent after March 27, 2001. Thus, Claimant

is entitled to permanent total disability compensation benefits from March 28, 2001 to present and continuing based on his average weekly wage of $868.94.

C. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician, such as Dr. Wyatt, indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was

necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

Dr. Wyatt credibly established that he sought authorization to treat Claimant and to perform a right radiofrequency procedure. He confirmed that Carrier denied authorization. No explanation has been forthcoming from Employer/Carrier why such a procedure, which was successful on the left side, would be denied on the right side. Dr. Wyatt testified that because of the success of the left-sided radiofrequency, it was reasonable to perform the same procedure on the right side with expectations of similar success. I find and conclude that Dr. Wyatt's recommended medical services for Claimant, to include a right-sided radiofrequency procedure, is both medically reasonable and necessary, for which Employer/Carrier are responsible.

Furthermore, in view of Dr. Wyatt's request for authorization to treat Claimant, I find Employer/Carrier's denial or neglectful actions were unreasonable and therefore Employer/Carrier are responsible for all reasonable, appropriate and necessary medical expenses arising from Claimant's September 1, 1999 work injury pursuant to Section 7 of the Act.

D. Section 8(f) Application

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers [an] injury . . . of total permanent disability or of death, found not to be due solely to that injury, . . . the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.
>
> (2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . . .

33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is **not due solely to the injury** which is the

subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

Generally, an employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a "pre-existing permanent partial disability," (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f); Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C & P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988).

In permanent partial disability cases, the Fifth Circuit Court of Appeals, in whose jurisdiction this matter arises, applies a four part standard which also requires a showing that the current permanent partial disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." Louis Dreyfus Corporation v. Director, OWCP, 125 F.3d 884, 887 (5th Cir. 1997).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, supra, at 516-517 (5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C & P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

1. Pre-existing permanent partial disability

Based on the medical records and opinions of Dr. Winters, I find and conclude that the record medical evidence establishes Claimant suffered a pre-existing permanent partial disability to his back as a result of his work injuries and/or surgeries in 1995 and 1997. Dr. Winters opined that Claimant reached maximum medical improvement on September 13, 1995, after his first back surgery and assigned a seven percent permanent partial impairment rating. Two years later, Dr. Winters assigned an additional seven percent impairment to Claimant as a result of his second back surgery after reaching maximum medical improvement on December 30, 1997. Claimant was returned to his normal work duties without restrictions.

Because the medical evidence which pre-dates Claimant's September 1, 1999 injury conveys a sufficiently unambiguous, objective and obvious indication of a permanent partial back disability, I find and conclude that Employer/Carrier established Claimant suffered from a permanent partial pre-existing back disability at the time of his work-related injury on September 1, 1999.

2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; See Eymard v. Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd

v. Todd Shipyards Corp., 16 BRBS 163, 167-168 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie, supra at 426. Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, supra; C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 88 (CRT) (1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983) (en banc).

A review of the medical records submitted that pre-date Claimant's September 1, 1999, injury reveal that Claimant was diagnosed with neurological and anatomical deficits at the L5-S1 level which required a laminotomy and discectomy on the right and left. I find the medical records of Dr. Winters disclose Claimant suffered from a permanent partial back injury. I further find that such records were available at the time of his recent work injury. Thus, I find and conclude that Claimant's pre-existing injuries were manifest to Employer at the time of Claimant's September 1, 1999 injury.

3. The pre-existing disability's contribution to a greater degree of permanent disability

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent total disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. If a claimant's permanent total disability is a result of his work injury alone, Section 8(f) does not apply. C & P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent total disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

I find Claimant's permanent total disability that occurred after his September 1, 1999 work-related accident is not due

solely to his last accident. I find that Claimant's pre-existing back condition combined with his back injury from the September 1, 1999 work-related accident causing him to be unable to return to his former job position as a production coordinator and becoming permanently totally disabled.

Dr. Winters opined that a combination of Claimant's two prior injuries with the most recent September 1, 1999 injury made Claimant's disability worse than it would have been from the 1999 injury alone. The prior permanent partial impairment rating increased from 14 percent to 20 percent, but more telling was the assignment of permanent work restrictions precluding Claimant's return to his former job.

Although Claimant retained a vocational residual ability to perform sedentary to light work, Employer/Carrier failed to establish their burden of showing suitable alternative employment, as fully discussed above. Therefore, Claimant is considered permanently and totally disabled. Since Claimant is not permanently partially disabled, the fourth standard of "materially and substantially greater than" the subsequent injury alone is inapplicable. Moreover, the District Director has averred support for the Section 8(f) application in the event of a finding of permanent total disability "to a percentage consistent with Claimant's injuries."

Accordingly, I find and conclude that Employer/Carrier established the three pre-requisites necessary for entitlement to Section 8(f) relief under the Act, since Claimant is found to be permanently totally disabled, and is eligible to receive Section 8(f) relief.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of

his injury or compensation was due.[3] Thus, Employer was liable for Claimant's disability compensation payments on September 15, 1999. Employer/Carrier commenced payments of compensation on September 22, 1999, and paid compensation benefits through April 6, 2000, at a lower average weekly wage of $844.78 than the stipulated average weekly wage of $868.94. Notwithstanding the payment of benefits, Employer/Carrier filed a notice of controversion on June 15, 2000.

Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by April 20, 2001, 14 days after compensation was discontinued to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer filed a timely notice of controversion on June 15, 2000, but is liable for Section 14(e) penalties for the difference between the disability compensation paid to Claimant and the disability compensation Claimant is owed based on the higher average weekly wage figure from September 22, 1999 until June 15, 2000, when it controverted the claim.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See

[3] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[4] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier's application for Section 8(f) relief is hereby **GRANTED.**

2. Employer/Carrier shall pay Claimant compensation for temporary total disability from September 1, 1999 to March 27, 2001, based on Claimant's average weekly wage of $868.94, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

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[4] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **June 4, 2002**, the date this matter was referred from the District Director.

3. Employer/Carrier shall pay Claimant compensation for permanent total disability from March 28, 2001 and continuing thereafter for 104 weeks, based on Claimant's average weekly wage of $868.94, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

4. After the cessation of payments by the Employer/Carrier, continuing benefits shall be paid pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further notice.

5. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2001, for the applicable period of permanent total disability.

6. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's September 1, 1999 work injury, pursuant to the provisions of Section 7 of the Act.

7. Employer shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing prior to June 15, 2000, as provided herein, exceed the sums which were actually paid to Claimant.

8. Employer shall receive credit for all compensation heretofore paid, as and when paid.

9. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

10. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 9th day of June, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge